**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

1. CRIMINAL WRIT PETITION NO.1424 OF 2003
Mr.Bhaskar Sen, .. Petitioner
Vs
The State of Maharashtra and ors. .. Respondents

Mr. O.A.Siddiqui, for the petitioner.
Mr R.Y.Mirza, APP for the respondent-State.
Mr P.K.Dhakephalkar, for respondent no.2.

WITH

2. CRIMINAL APPLICATION NO.3191 OF 2004
Siddharth Srivastava, .. Petitioner
vs
The State of Maharashtra, .. Respondent

Mr. Subhash Jha with Mr G.Upadhye and Mr.Gaurav Agrawal for the petitioner.
Mr R.Y.Mirza, APP for the respondent-State.
Mr.O.A.Vaishnav, for the complainant.

WITH

3. CRIMINAL APPLICATION NO.3192 OF 2004
Siddharth Srivastava, .. Petitioner
vs
The State of Maharashtra, .. Respondent

Mr. Subhash Jha with Mr G.Upadhye and Mr.Gaurav Agrawal for the petitioner.
Mr R.Y.Mirza, APP for the respondent-State.
Mr.O.A.Vaishnav, for the complainant.

WITH

4. CRIMINAL APPLICATION NO.3392 OF 2004
Lalit Gandhi & Anr .. Petitioners
vs
The State of Maharashtra & Anr .. Respondents

Mr D.C.Shah, for the petitioners.
Mr S.R.Shinde, APP for the respondent-State.
Mr Kuddas Harialla, for respondent.

WITH

5. CRIMINAL APPLICATION NO. 3129 OF 2004
Mr Keki Framroze Daruwalla,.. .. Petitioner
vs

The State of Maharashtra & Anr. .. Respondents.

Mr.R.R.Bhosale, for the petitioner.
Mr K.V.Saste, APP for the respodnent-State.

**CORAM : D.B.BHOSALE,J.**

**DATE : 1st SEPTEMBER, 2004.**

**JUDGMENT:**

1. This group of five petitions involves a common question of law and, therefore, were heard together and are being disposed of by this common judgment. The prayer in the first four petitions is for quashing of the non-bailable warrants (for short, "NBW"), while in the last petition the prayer is for quashing of the order passed under section 82 of Criminal Procedure Code, 1973 (for short, "Code"), by which the proclamation has been published requiring him to appear before the learned Magistrate. All these petitions arise from the proceedings under section 138 of Negotiable Instruments Act, (for short, "the Act").

2. The question raised in these petitions is as to whether in summons case it is imperative for an accused to appear in the trial Court on each and every date of hearing and/or whether the Courts should be generous and liberal in exercising the powers conferred under sections 205 and 317 of the Code and dispensing with a

physical presence of an accused unless his presence is imperatively needed. For appreciating the submissions of the learned counsel for the parties better and for deciding the said question, the factual matrix in all the petitions, that would be relevant and material, in brief, is as under.

(a) In Criminal Writ Petition No.1424 of 2003, the complaint under section 138 read with section 141 of the Act came to be filed on 22.8.2002. The summons were issued on 28.3.2003 calling upon the petitioner-accused to appear on 19.4.2003. In due compliance of the summons, the Advocate filed an appearance on behalf of the petitioner on 19.4.2003. On the very same day, a warrant was issued to secure presence of the petitioner. On 12.9.2003, the revision application was filed in the Sessions Court, Thane, against the order of issuance of the warrant. The revision was dismissed on 12.9.2003. Hence,this petition was filed on 23.9.2003.

(b) The complaints, in Criminal Application Nos.3191 and 3192 of 2004 were filed in December, 2003 against the petitioner. He was summoned to appear in both the complaints before the trial Court on 15.3.2004. The petitioner engaged an Advocate who could not appear when the matter was called out and as a result of which NBW

was issued by the learned Magistrate on 15.3.2004. The Advocate on the very day made an application and prayed for a stay to the NBW until the next date, i.e.

10.5.2004. The stay was granted as prayed for. The application was filed on 8.5.2004 for cancellation of NBW, since it was not possible for the petitioner to appear before Court on 10.5.2004. On 8.5.2004, the concerned Magistrate was on leave and hence the application was moved before the in-charge Court, which directed the petitioner to move before the concerned Court on 10.5.2004 itself. On 10.5.2004, the petitioner was granted exemption by extending the order of stay to NBW granted earlier. On 14.5.2004, the learned Magistrate cancelled the NBW and directed the petitioner to execute a bond. On 17.5.2004, the matter was adjourned to 12.7.2004 and on that date the learned Magistrate issued NBW after rejecting the application filed by the petitioner's advocate seeking personal exemption. Hence, these petitions.

(c) In Criminal Application No.3392 of 2004, the complaint was filed on 1.4.2003. The process was issued on 29.8.2003. The petitioners were summoned to appear on 18.12.2003. The petitioners did appear on

18.12.2003. However, the Board was discharged to 6.3.2004. On 6.3.2004, though the petitioners were required to wait in the Court for 2.1/2 hours, the matter did not reach and the Board was once again discharged and the matter stood adjourned to 7.8.2004. On 7.8.2004 the petitioner, who is 62 years old, filed an application for exemption through his Advocate. However, it was rejected and on the request of the Advocate for the complainant, NBW was issued. In this case, out of the four accused, only two accused were served. The petitioners reached the Court on very day and through their Advocate applied for cancellation of the warrant. The learned Magistrate insisted to serve a copy of the application seeking cancellation of the warrant on the complainant. The Advocate for the petitioners made an attempt to serve a copy of the application on the Advocate for the complainant who refused to accept on the ground that the complainant had already left the Court. The learned Magistrate did not take the application on record and in this backdrop the petitioners have approached this Court by way of the instant application.

(d) In Criminal Application No.2129 of 2004, the complaint was filed in August, 1998. The petitioner claims that he appeared almost on all dates either

personally or through his Advocate. Initially, a bailable and thereafter non-bailable warrant was issued to secure his presence though his Advocate used to attend every date of hearing before the learned Magistrate. Since the petitioner, who is from Mumbai, could not appear before the learned Magistrate, the order under section 82 of the Code came to be passed on 19.7.2004. Hence, this application.

3. It is against a backdrop of these facts, I would like to consider the question of law raised by the learned Advocates appearing for the parties. I heard all the learned counsel appearing in these matters for quite some time. The leading arguments were advanced by Mr.Jha and Mr Siddiqui, learned counsel appearing for the petitioners. The submissions of the learned counsel for the parties, in brief, are as follows.

(a) The accused in the cases under section 138 of the Act need not remain present in the trial Court on every date of hearing and that the Court should exercise discretionary powers conferred on it under sections 205 and 317 of the Code to grant personal exemption to the accused. Mr Jha, learned counsel, took me through the various judgments of the Apex Court and High Courts. He placed heavy reliance on the judgment of the Apex Court

in **Bhaskar Industries Ltd Vs. Bhiwani Denim & Apparels Ltd and ors, (2001) 7 Supreme Court 401** and contended that the personal attendance of the accused can be dispensed with throughout or at any particular stage of the proceedings in a summons case. Reliance was also placed on the judgment of this Court in **Shri Walmik s/o Deorao Bobde Vs. The State of** M**aharashtra and anr, 2001 All MR (Cri) 1731** to contend that NBW should ordinarily be issued as a last resort. He further placed reliance upon the judgments of Calcutta High Court in **Ajit Kr Chakraborty and ors Vs. Serampore Municipality, 1989 CRI L.J.523** and of Orissa High Court in **Ganesh Choudhury Vs. Harish Chandra Misra, 1998 Cri.L.J.2412**. My attention was also invited to the judgment of the Apex Court in **Chandu Lal Chandraker Vs. Puran Mal and Anr, 1988 (Supp) Supreme Court Cases 570** to contend that in the said case in view of the accused's statement before the Apex Court that he would not make any statement under section 313 of the Code and would not raise any question of prejudice, if any, caused to him due to non-exemption, his request for personal exemption before the trail Court was granted by the Apex Court.

(b) Mr Siddiqui, apart from the judgments relied upon by Mr Jha, learned counsel for the petitioners, invited my attention to the judgments of the Apex Court in

**U.P.Pollution Control Board Vs. Mohan Meakins Ltd , (2000) 3 SCC 745** and in **R.Annapurna Vs. Ramadugu Ananth Krishna Sastry, (2002) 10 SCC 401** and contended that if any of the accused applies for dispensing with his personal appearance in the Court, the trial Court can exempt him from continuing to appear in the Court by imposing any conditions which the Court deems fit. Such conditions can include, inter alia, that a counsel on his behalf would be present when the case is called out, that he would not dispute his identity as the particular accused in the case and that he would be present in the Court when his presence is imperatively needed.

4. Keeping in view the importance of the issue involved in these petitions, I called for some information from the registry, which would be relevant and material to address the question raised in these petitions and appreciate the submissions of the learned counsel for the parties better. Let me quote the facts and figures furnished by the registry about pendency of the proceedings under section 138 of the Act. In the Metropolitan City of Mumbai, apart from other summons cases, pendency of complaints filed under section 138 of the Act is 93,631 and in rest of the State of Maharashtra 2,28,249 cases. For dealing with these cases in Mumbai, we have 41 judicial officers and

outside Mumbai 492. Their average disposal per month in Mumbai is 57.24 percent and in the Courts outside Mumbai it is hardly 9.24 percent. These figures would show the alarming situation of the huge pendency of the cases under section 138 of the Act in the State of Maharashtra.

(a) It is useful to note the observations of the Apex Court made while dealing with the proceedings under section 138 of the Act in **Bhaskar Industrial Ltd** case (supra). It has been observed that "These are days when prosecutions for the offence under section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through facilities of the banks, it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely, such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of a summons case. When a Magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the Magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution

proceedings."

5. It is common knowledge and general experience that due to heavy workload of cases and huge pendency of complaints pending before the Courts of Magistrates, enquiries or trials in criminal cases take long time than one expected. I am informed that on daily board of different Courts, a large number of cases are fixed on a single day which result in congestion of court work, litigants and advocates at a given point of time. This further results into undue hardships to advocates and litigants. Though the cases are placed on board, they do not reach for an enquiry or trial for months and years together. For variety of reasons the Courts cannot proceed with the cases when they are fixed for trial or for final argument. Resultantly, on most of the occasions, the dates are given to the parties either by the Courts or on some occasions by the Bench Clerk, particularly when the Court discharges the board. On every date, however, parties require to attend the Court and mark their presence. Parties go to the Court, remain sitting outside the Court from morning to evening waiting for the call of their cases but without effective hearings for want of time. It may be noted that most of the Courts do not have proper infrastructure and/or facilities for the clients, such

as waiting room, drinking water and toilets etc. This causes tremendous hardships not only to the parties but also to the staff in the Court and the Registry. If accused do not attend the Court on the given date, the Court issues bailable or non-bailable warrant even if the advocate appears and applies for exemption.

(a) It is also a general experience that a complainant and his advocate, instead of proceeding with the case, pray for issuance of NBW against the accused if he does not appear. Resultantly, the Court, even if is in a position to proceed with the matter, instead of doing so issues bailable or NBW against the accused which unnecessarily causes further delay in disposal of the case. In this backdrop it has become imperative to consider as to whether the Court should be generous and liberal in exercising the powers conferred under sections 205 and 317 of the Code granting exemption to the accused from personal appearance without causing prejudice to the prosecution proceedings.

6. Sections 205 and 317 of the Code give wide powers to the Courts for dispensing with the personal attendance of the accused at every stage of the case. The Apex Court in **Bhaskar Industries Ltd** (supra) while

dealing with section 205, has observed that in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record a plea of the accused even when his counsel makes such plea on behalf of the accused in a case where personal appearance of the accused is dispensed with. It would be useful to quote section 205 of the Code. It reads thus:

> "205. Magistrate may dispense with personal attendance of accused : (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.
>
> (2) But the Magistrate inquiring into or trying the case may, in his discretion at any stage of the proceedings direct the personal attendance of the accused, and if necessary, enforce such attendance in the manner hereinbefore provided."

Sub-section (1) of section 205 empowers the Magistrate

to dispense with personal attendance of the accused and permit him to appear by his pleader. Sub-section (2) provides that the Magistrate can exercise his discretion at any stage of the proceedings including the first appearance in the case and direct the personal attendance of the accused, if necessary. The Magistrate is expected to see whether there is any justification for refusing the accused's prayer for exemption from personal attendance and must indicate convincing reason for rejecting that prayer.

(a) Section 317 of the Code reads thus:

> "317. Provision for inquiries and trial <u>being</u> held in the absence of accused in certain cases: (1) At any stage of an inquiry or trial under this Code, if any Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interest of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may at any subsequent stage of the

> proceedings, direct the personal attendance of such accused.
>
> (2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

Section 317 of the Code, thus, empowers the Court to dispense with the personal attendance of an accused at any stage of the enquiry provided he is represented by a counsel and while so doing may direct the personal attendance of such accused at any subsequent stage of the proceedings. Sub-section (2) of section 317 provides that if the accused is not represented by a pleader or if the Judge or Magistrate considers his personal attendance necessary, he may , if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial or order that the case of such accused be taken up or tried separately.

(b) It is thus clear, that the powers under section 317 could be and should be exercised only if a Court is

satisfied that in the interest of justice the personal attendance of an accused need not be insisted and that the Court has the power to dispense with the attendance of that accused. However, one precaution which the Court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as a particular accused in the case, and that a counsel on his behalf would be present in the Court and that he has no objection for recording a plea on his behalf of a counsel and in taking evidence in his absence. This precaution is necessary for further progress of the proceedings.

(c) Sections 205 and 317, if read jointly, they make it clear that the Court has wide powers to dispense with the personal attendance of the accused at all stages of the proceedings. Section 317 covers the stages after the commencement of inquiry or trial. Section 205 deals with the stage at commencement of the proceedings before the Magistrate thereby indicating that in appropriate cases the presence of the accused could be dispensed with even at the initial stage including the first appearance and permit him to appear through an advocate. When the presence of an accused is imperatively needed at any subsequent stage of an inquiry or trial, the

Court is armed with sufficient powers to secure his presence in such case. it may be stated that no hard and fast rule can be laid down for the exercise of the power under sections 205 and 317. Each case will have to be considered after giving due weight to attendant circumstances. I am of the considered opinion,that ordinarily, the Court should be generous and liberal in exercising the powers conferred under sections 205 and 317 and grant exemption to the accused from personal appearance, except when the presence of the accused is imperatively needed. The court should also bear in mind the nature of accusation and the prejudice, if any, likely to be caused to the prosecution or the complainant if personal attendance is dispensed with or to the accused if personal attendance is made compulsory.

7. The Apex Court in **Bhaskar Industries Ltd** (supra) has elaborately dealt with all the relevant provisions of the Code while dealing with the issue of dispensing with personal attendance of an accused in criminal Courts in the interest of justice. The observations of the Apex Court in paragraphs 17, 18 and 19 could be useful. Paragraphs 17, 18 and 19 read thus:

"17. Thus, in appropriate cases the

Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is impowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the Court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in Court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including

examination of the witnesses.

18. A question could legitimately be asked - what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not cooperate in proceeding with the case? We may point out that the legislature has taken care of such eventualities. Section 205(2) says that the Magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of section 317(1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such attendance.

19. The position, therefore, boils down to this: it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any

particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instance where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interest of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a Magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the Magistrate can consider all aspects and pass appropriate orders thereon before proceeding further."

8. The Apex Court in **Chandu Lal Chandraker** case (supra), made reference to sections 205 and 313 of the Code and observed that even the statement of the accused under section 313 of the Code in a given case, could be dispensed with if he requests and gives an undertaking to the effect that he would not raise any question of prejudice, if any, caused to him due to non-examination under section 313 at any subsequent stage of trial, appeal, or revision. In that case after recording the statement of a counsel on behalf of the accused that he shall not raise any question of prejudice, if any, caused to him on account of his nonexamination under section 313, held that it was not necessary for the accused to appear before the trial Court. While passing such order, the order of the trial Court and the High Court directing the appellant to appear before the trial Court for making statement under section 313 of the Code was set aside by the Apex Court.

9. At this juncture, it would be advantageous to make reference to some other provisions in the Code. The Second Schedule of the Code provides Form No.1, i.e. Form of Summons to an accused person, as contemplated under section 61 of the Code. Form No.1 reads thus :

"Summons to an accused person

To, (name of accused) of (address)

. WHEREAS your attendance is necessary to answer to a charge of (state shortly the offence charged), you are hereby required to appear in person (or by pleader, as the case may be) before the (Magistrate) of .... ... on the ... ... day of ... ... Herein fail not.

Dated, this --- day of ----, 19

(Seal of the Court) (Signature)"

It clearly requires an accused to appear in person or by a pleader. It does not insist that the accused should appear in person on receipt of summons in the case.

(a) Section 273 of the Code is also useful. It says that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding, shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader. Section 273 requires that the evidence be taken in the course of trial in the presence of the accused and that is why physical presence of an accused is insisted upon in the trial. There does not seem to be any other reason contemplated or envisaged under the Code requiring physical presence of the accused in the trial. The legislature in its wisdom appears to have introduced section 273 of the Code for the benefit of the accused so that during the course of the trial or other

proceedings, he can assist his advocate or safeguard his interest. Physical presence is not insisted upon because it is so desired by the complainant. The section is, therefore, introduced for the benefit of the accused and not for causing hardships or inconvenience to the accused. It is, therefore, necessary that in a case where the accused himself applies to the Court to be exempted from personal appearance, than the Court should grant such request unless it is of the opinion that in the interest of justice it is necessary that the accused should be present throughout the course of trial or unless there are some other good reasons for directing the presence of the accused throughout the course of the trial. It is, however, necessary in such situation for the accused to give an undertaking to the Court that in his absence his Advocate on record shall appear on every date of hearing and see to it that under any circumstances progress of the proceedings is not hindered.

(b) In a given case that if an accused personally gives an undertaking before the Court that he does not wish to answer any of the questions which would be put to him by the trial Court under section 313 of the Code and he further states that he will not raise question of prejudice, if any, caused to him on account of his

non-examination at subsequent stage of the trial, in appeal or revision, the Court may, in a given case, grant him such permission and exemption from appearing before the trial Court till his case is disposed of by the Court.

(c) Section 87 of the Code provides issue of warrant in lieu of, or in addition to, summons. Section 87 of the Code reads thus:

> "A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest -(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure."

Thus, the power conferred under this provision is sufficient enough to secure presence of an accused when his presence is imperatively needed or becomes indispensable for the progress of the case. Under this provisions, it is necessary that warrant of arrest for securing presence of the accused be issued only in the following eventualities and, that to, by recording its reasons in writing. Firstly, if Court sees reason to believe that he has absconded or will not obey the summons and, secondly, if without reasonable excuse, he fails to appear inspite of service of summons. His appearance through a counsel on receipt of the summons would, however, be sufficient compliance of the summons or that could be treated as obeyance of the summons. In other words, on receipt of summons, the accused need not personally appear before the Court unless so specifically directed by the Court for the reasons recorded to that effect by the Court. Even the invocation of the provisions of sections 82 and 83 of the Code, should ordinarily be as a last resort.

(d) A reference to section 143 of the Act, at this stage, would be useful. It deals with power of Court to try cases summarily. It provides that notwithstanding anything contained in the Code, all offences under

Chapter XVII of the Act shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials. Sub-section (3) of section 143 provides that every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. It is general experience that Courts for variety of reasons can hardly, observe the time frame under this provision. One of the main reasons, in my opinion, is the absence of an accused on the date of hearing of the case. Considerable time of the Courts is wasted in securing presence of the accused. The Courts, in such cases, issue bailable or nonbailable warrants and as a result of which it causes further delay in disposal of cases/complaints. Instead, if the Courts proceed with the cases by taking precaution, which I would be indicating in the next paragraph, in my opinion, that would help speedy disposal of cases, reducing a huge pendency and that would also facilitate the parties to arrive at a settlement, if any, in the complaints under section 138 of the Act at an early stage. It may be noticed that section 147 of the Act at an early stage. every offence punishable under this Act compoundable.

10. A large number of cases are being filed in this Court seeking cancellation of NBW issued either while rejecting the application for exemption or for nonappearance of the accused on one date of hearing even if Advocate for the accused appears on his behalf. It is also observed that the complaints under section 138 of the Act are being filed against the companies in which all the directors are being arraigned as accused and their presence is being insisted on every date of hearing and no proceedings are being taken up in their absence. It is further observed that the progress of the cases under section 138 impedes for want of their presence. The fact remains as to why their presence is being insisted on every date of hearing. The idea is to see that the progress of the case is not hindered for want of presence of the accused or even the complainant for that matter. Keeping this in view and against a backdrop of the observations made in the foregoing paragraphs, I deem it appropriate to issue the following directions to the Courts trying summons cases and in particular, cases under section 138 of the Act.

(i) Ordinarily, the Court should be generous and liberal in exercising powers under sections 205 and 317 of the Code and grant exemption to the accused from

personal appearance unless presence is imperatively needed or becomes indispensable. While considering the application for exemption, the Court should also bear in mind the nature of accusations and prejudice, if any, likely to be caused to the prosecution or the complainant, if personal attendance of the accused is dispensed with or to the accused if personal attendance is insisted upon, as case may be.

(ii) If an accused makes even the first appearance through a counsel, he may be allowed to do so.

(iii) If an accused is seeking permanent exemption in a case, the Court, while dealing with such application, should take precautions that the accused gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in the Court on all dates of hearings and that he has no objection for recording a plea on his behalf of a counsel and in taking evidence in his absence.

(iv) While dealing with the application seeking permanent exemption from appearing in the case as aforestated, if, the Court for any reasons is of the opinion that such exemption should not be granted, it may do so by recording or indicating reasons for rejecting such prayer.

(v) It is open for the Court to grant exemption which

is either permanent or for a specific period, depending upon the facts of each case, on the conditions as it deems fit and proper, requiring the accused to file an undertaking as indicated earlier.

(vi) In a given case, the Court may record a plea of the accused even when his Advocate makes such plea on his behalf in a case where personal appearance of the accused is dispensed with on his furnishing the undertaking in terms of clause (iii). However, it is open for the Court to refuse such permission for reasons to be recorded separately.

(vii) The Court should avoid issuance of nonbailable warrant in the first instance to secure presence of the accused facing trial and it should be applied as a last resort.

(viii) If a counsel for the accused fails to appear in the matter and his absence impedes further progress of the proceedings including examination of witnesses, the Court may resort to any other course as may be available under the provisions of the Code to secure presence of the accused, including issuance of NBW and may cancel the order of exemption and in such case may or may not grant exemption any more.

(ix) The Court should avoid requiring the accused or his Advocate to apply for exemption on every date of hearing.

(x) While exercising the powers to grant exemption, under any circumstance, the Court shall not compromise with the further progress of the proceedings and see to it that the presence or absence of either of the parties does not impede the proceedings.

(xi) In a given case, similar parameters be applied for granting exemption to the complainant if his absence is not likely to cause prejudice, if any, to the accused or hinder the progress of the case/complaint.

11. In so far as the instant five petitions are concerned, the orders impugned shall remain stayed until the concerned Magistrates pass appropriate orders keeping in view the observations made in this judgment. The learned Magistrates to pass appropriate orders within two weeks from the date of receipt of this judgment. The petitioners are directed to produce a copy of this judgment before the concerned Magistrate within four weeks from today.

12. In the result, these petitions are disposed of. . An authenticated copy of this order may be made available to the parties.

(D.B.Bhosale, J.)

j-dwp1424

**HIGH COURT**
**CRIMINAL APPELLATE SIDE**

1. Criminal Writ Petition No.1424 of 2003
2. Criminal Application no.3191 of 2004
3. Criminal Application no.3192 of 2004
4. Criminal Application no.3392 of 2004
5. Criminal Application no.3129 of 2004

**Date of Judgment:**

**1st September, 2004**

**For approval and signature**

**THE HON'BLE MR.JUSTICE D.B.BHOSALE.**

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?